No. 3886

United States
Circuit Court of Appeals
For the Ninth Circuit

K. HIRATA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR

From the United States District Court of the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, *Judge.*

BRIEF OF PLAINTIFF IN ERROR

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

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STATEMENT OF THE CASE.

The plaintiff in error was indicted in the lower court on two counts for violating the Harrison Narcotic Act. In the first count he was charged with illegal possession of a certain quantity of narcotics and in the second count he was charged with selling a certain quantity of narcotics (transcript, pages 1, 2, and 3). To this indictment and to the separate counts therein the plaintiff in error pleaded not guilty (transcript, page 4). Thereafter on the 30th day of November, 1921, the cause came on regularly for trial before the Honorable Jeremiah Netterer, judge presiding. Prior to the calling and impaneling of the jury and after the case was called for trial, the plaintiff in error interposed a motion to suppress certain evidence, to-wit: a number of

packages of morphine and cocaine, which had been taken from the hotel conducted by the plaintiff in error, by the arresting officers, for the reason that the seizre had been made without the use of a search-warrant and in violation of the fourth and fifth amendments to the Federal constitution. The Court refused to hear any evidence in support of this motion and refused to consider the same on the ground that such a question could not be raised after the cause had been called for trial. To this ruling an exception was taken and allowed. Thereupon a jury was empanelled and sworn and evidence given on behalf of both parties. (Transcript pages 9, 10, and 11). No serious attempt was made on behalf of the government to establish a sale in support of count two of the indictment; the evidence practically in its entirety being directed to establishing possession of the narcotics in question by the plaintiff in error at the time and place charged in the indictment (transcript, pages 12 and 17).

In the matter of the search-warrant, the arresting officers testified that the search and seizure was made without the use or aid of a search warrant (transcript, page 14). In the matter of the alleged sale, the arresting officers testified that they had given an addict $3 in marked money and sent her to the hotel conducted by the plaintiff in error to effect a purchase of narcotics. That in five or ten minutes thereafter the addict returned with a

small package or "bindle" of narcotics. That they immediately came into the hotel, found the plaintiff in error in the office on the second floor, and after a search of his person found him in possession of the three marked one-dollar bills. But whether these bills had been turned over to him by the addict for room rent or past indebtedness they were unable to state. The plaintiff in error denied any sale and explained that the $3 had come into his possession in the regular course of business (transcript pages 12 and 13).

Thereafter the officers took the plaintiff in error through the rooms on the third and fourth floors of the hotel—a hotel consisting of some thirty odd rooms and finally on the fourth floor under the carpet they found the narcotics introduced in evidence (transcript, pages 12 and 13). At the close of the trial the jury returned a verdict of guilty on each of the two counts and after a motion for a new trial had been interposed and denied and an exception allowed to the ruling, the plaintiff in error was sentenced to fifteen months in the Federal penitentiary at McNeil's Island on each count to run concurrently (transcript, pages 4, 5 and 6).

ASSIGNMENT OF ERRORS

Now comes the defendant, K. Hirata, and in connection with his petition for a writ of error in this cause, assigns the following errors which said defendant avers occurred on the trial thereof, and

upon which he relies to reverse the judgment herein as appears of record:

I.

The Court erred in overruling the defendant's motion to dismiss the cause on the ground that no search-warrant was used or issued at the time of the search of the defendant's premises and the seizure of the contraband to be used as evidence, which motion was interposed at the time the cause was called for trial and before the impanelling of the jury.

II.

The Court erred in refusing to grant the motion of the defendant to strike all of the testimony of N. P. Anderson, a witness for the plaintiff, which motion was based upon the ground that the testimony of this witness and the evidence introduced by him was based upon and secured by reason of illegal search of defendant's premises.

III.

The Court erred in referring to permit the defendant to interrogate the witness, N. P. Anderson, a witness for the plaintiff, as to whether he had searched the premises of the defendant without a search-warrant and as to whether the witness knew that it was a (24) criminal offense under the laws of the State of Washington to search a man's home or place of business without a valid search-warrant.

IV.

The Court erred in admitting in evidence, over the objection of the defendants, Exhibits Nos. 1, 2 and 3 introduced by the plaintiff for the reason that said exhibits were secured by an illegal and invalid search and seizure.

V.

The Court erred in denying the defendant's motion to require the plaintiff to elect as to which of the counts of the indictment it would stand on for a conviction.

VI.

The Court erred in submitting this cause to a jury for the reason that there was no evidence upon which a conviction could be sustained.

VII.

The Court erred in denying the defendant's motion for a new trial herein, which motion was made in due time as the jury had returned a verdict of guilty, and was upon the following grounds:

1. That said verdict was against and contrary to law.

2. That said verdict was against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Error of law occurring during the trial and excepted to at the time by the defendant.

VIII.

The Court erred in imposing the sentence herein.

ARGUMENT

It is unnecessary to discuss at any length the error of the trial judge, on the question of the guilt or innocence of the plaintiff in error on the second count of the indictment, and this for several reasons:

In the first place, as pointed out in the statement of the case, there was no serious attempt on the part of the government to prove a sale. In the second place, no sale was proven. In the third place, if the Court erred in refusing to consider the motion of the plaintiff in error, to suppress the evidence unlawfully seized and improperly admitted in evidence, the cause must be reversed and a new trial ordered upon both counts of the indictment.

We pass now to a consideration of the principal and vital error in the case. The trial judge without a hearing on the merits peremptorily ruled that the motion to suppress was not timely and refused to receive any evidence in support of the same, or to give it any consideration whatsoever. This ruling was directly contrary to the decisions of the Supreme Court of the United States:

Amos vs. The United States, 255 U. S. 313;
Gaulet vs. The United States, 255 U. S. .....
41 Sup. Ct. 261.

In the first of the two cases cited, as this Court no doubt recalls, the jury had been impanelled and the trial actually commenced when the motion to suppress was interposed and yet the Court held that the motion was made in time and should have been considered.

While the actual search and seizure was made by two police officers of the City of Seattle, the plaintiff in error might and indeed could have established beyond all question that they were acting in conjunction with and under the supervision of the special agents of the Federal Government and had an opportunity been given to introduce this evidence, it would have been the duty of the trial judge to suppress the evidence seized and thereafter dismiss the cause.

It has been repeatedly held by the federal decisions that the government's participation, directly or indirectly, with an unlawful search and seizure will avoid the whole proceedings, (*United States vs. Falloco,* 277 Federal 75; *Slusser vs. U. S.,* 270 Federal 818; *Flogg vs. U. S.* 233 Federal 481; *Kanellos vs. U. S.,* 282 Federal 465; *Silverthorne vs. the U. S.,* 251 U. S. 385, 391). In the *Falloco* case, *supra,* in discussing this question the following very pertinent language was used:

> "I am convinced, upon careful analysis, that the relationship between the state and federal officers in the cases at bar was such as to take these cases out of the rule just stated.

There were conferences between state and federal authorities. Those conferences were held with a view to a closer co-operation between the two jurisdictions in the enforcement of the prohibitory law. Our attention here is confined to the situation shown to exist during a restricted period, to-wit, the months of July and August of last summer. It is true undoubtedly, as suggested, that in the minds of the federal officers there was no purpose of expanding the federal jurisdiction, and bringing a greater flood of cases to the federal court. It is true that they had not in mind the use of unconstitutional summary methods of securing evidence, and that they desired greater activity in the way of prosecutions in the jurisdictions of the state; nevertheless the effect of these conferences was to stimulate activity on the part of the state authorities, with the objectiev of a more effective enforcement of the Volstead Act. The resulting procedure, whatever the underlying motive, was that, during the limited period referred to, the great majority of prosecutions in the federal court were initiated by the police officers of the state; that the violations in which arrests were made were brought, and intended to be brought, immediaetly to the federal court, and were not intended to be, and were not, taken to the state court, except, perhaps, in very exceptional cases, unless the federal authorities declined to take cognizance of them. On the other hand, the enforcement officers of the government understood this, acquiesced in it, and acted in accordance with this

tacit, if not express, understanding. Those arrested one day were brought regularly to the federal court on the following morning. The procedure was systematic and frictionless.

Under such circumstances, I do not think it necessary to show that the officers of the government had special knowledge, or issued special directions, in each specific case. If we were to ignore this circuitous, uninterrupted, but substantial evasion of the Fourth Amendment to the Constitution of the United States, even though that evasion was unconscious and unstudied, we should countenance a departure from the spirit of our fundamental law more harmful in its far reaching effects than the evil here sought to be remedied. Nothing herein said is to be construed as a surrender of the right of the government to avail itself, without stint, of evidence incidentally secured by state officers under the rules, principles, and conditions announced by the Supreme Court and other courts of the United States. I simply hold that, under the situation here presented by the record, the police officers in the cases at bar were so far recognized agencies of the government in the enforcement of the prohibitory law that their acts must be governed by the limitations imposed by the Federal Constitution. This being so, the applications of the defendants, Falloco and Ross, must be sustained."

In the case of the *United States vs. Maresca,* (276 Federal, 713), it was held that the greatest lati-

tude should be allowed in admitting evidence to prove that a search and seizure was in violation of the fourth and fifth amendments to the Federal Constitution. In the present case, the plaintiff in error was not permitted to introduce any evidence whatsoever, the trial court even refusing to consider the motion on its merits, and in conse quence he was tried and convicted on evidence unlawfully seized.

In the light of the record and the decisions hereinabove cited, we respectfully submit that we are entitled to a reversal and retrial of this cause.

WALTER METZENBAUM,

Attorney for Plaintiff in Error.